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# In the Supreme Court of the United States

INYO COUNTY, A PUBLIC ENTITY; PHIL MCDOWELL, INDIVIDUALLY AND AS DISTRICT ATTORNEY; DAN LUCAS, INDIVIDUALLY AND AS SHERIFF,
*Petitioners*,

v.

PAIUTE-SHOSHONE INDIANS OF THE BISHOP COMMUNITY OF THE BISHOP COLONY; AND BISHOP PAIUTE GAMING CORPORATION,
*Respondents*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF OF AMICUS CURIAE, CALIFORNIA STATE SHERIFFS' ASSOCIATION, IN SUPPORT OF PETITIONERS

PAUL R. COBLE
*Counsel of Record*

MARTIN J. MAYER
JONES & MAYER
3777 NORTH HARBOR BLVD.
FULLERTON, CA 92835
(714) 446-1400

*Counsel for Amicus Curiae*

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
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## TABLE OF CONTENTS


Table of Authorities . . . . . ii

Introduction . . . . . 1

Request for Leave to File Amicus Curiae Brief on Behalf of Petitioners County of Inyo, et al . . . . . 2

The Ninth Circuit Decision Renders Illusory the Promise of Public Safety Implicit in Public Law 280 . . . . . 3

The Ninth Circuit Decision Nullifies the Policy of Rights and Responsibilities Inherent to Our System of Ordered Liberty . . . . . 5

Inyo County Officials Are Entitled to Qualified Immunity . . . . . 9

Conclusion . . . . . 12

## TABLE OF AUTHORITIES

**Cases:**


Anderson v. Creighton,
483 U.S. 635 (1987); on remand,
724 F.Supp. 654 (D. Minn. 1989) . . . . . 9

Auriema v. Rice,
910 F.2d 1449 (7th Cir. 1990) . . . . . 9

Barts v. Joyner,
Cert. Denied, 493 U.S. 831(1989) . . . . . 9

California v. Cabazon Band of Mission Indians,
480 U.S. 202 (1987) . . . . . 11

City of Boerne v. Flores,
521 U.S. 507 (1997) . . . . . 6

Confederated Tribes of Colville Reservation v.
State of Wash.,
938 F.2d 146 (9th Cir. 1991) . . . . . 4, 7

Cooper v. Dupnik,
924 F.2d 1520 (9th Cir. 1991) . . . . . 9

Lopez v. Robinson,
(4th Cir. MD 1990) . . . . . 9

Malley v. Briggs,
475 U.S. 335 (1986) . . . . . 9

Nicholson v. Georgia Department of Human Resources,
918 F.2d 145 (11th Cir. GA 1990) . . . . . 9





Quechan Indian Tribe v. McMullen,
984 F.2d 304 (9th Cir. 1992) . . . . . 11

Romero v. Kitsap County,
931 F.2d at 627-28 . . . . . 10

United States v. Forney,
9 F.3d 1492 (11th Cir. 1993) . . . . . 6


**Constitution and Statutes:**


18 U.S.C. § 1162 . . . . . 3, 4, 11


**Other Authorities:**


106 Senate Report 327 . . . . . 4

The Case Against a Right to Religion-Based Exemptions,
4 Notre Dame J. of Law, Ethics & Public
Policy 591(1990) . . . . . 6

Doriane Lambelet Coleman, "The Seattle
Compromise: Multicultural Sensitivity and
Americanization, 47 Duke L.J. 717 (1998) . . . . . 6

Peter Laslett, Introduction to John Locke, Two
Treatises of Government 46-49 (Peter Laslett ed.,
student ed. 1988) (3d ed. 1698) . . . . . 5

Rousseau, The Social Contract, 1762) . . . . . 6

## INTRODUCTION

The opinion of the Ninth Circuit Court of Appeals serves to establish hundreds, and with the growth of so-called "Indian Land" perhaps many more, tribal enclaves that are now virtual sanctuaries where evidence, or even the perpetrators, of off-reservation (as well as on-reservation) criminal acts may be secreted, immune from a search by law enforcement officers who are investigating the violation of state crimes. And this is so even where, as here, those state law enforcement officers have obtained a search warrant satisfying the probable cause requirements of the Fourth Amendment.

These enclaves of a safe haven for the secretion of evidence and perpetrators are not limited to some remote wilderness, desert or high plains prairie where the issue is seldom likely to arise. Rather, they include tribal commercial gambling casinos, which are proliferating throughout the nation, other tribal operated businesses such as ski resorts, the offices of Indian tribal agencies, and other tribal offices and properties, located throughout the various reservations and other Indian country[1] within the Western States comprising the Ninth Circuit.

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[1] Amici use the term "Indian country" as a term of art commonly used by Native Americans and others to describe land over which a Native American tribe asserts dominion.

## REQUEST FOR LEAVE TO FILE AMICUS CURIAE BRIEF ON BEHALF OF PETITIONERS COUNTY OF INYO, ET AL

The effect of the Ninth Circuit's opinion regarding tribal sovereign immunity vis-a-vis state law enforcement investigation of state crimes is crucial in its impact on all 58 counties that comprise the State of California. This is because every state law enforcement official . . . the sheriff in each of the 58 counties in California, any one of the more than 400 municipal chiefs of police throughout California, any one of the state level law enforcement officials such as the California Department of Justice, the California Highway Patrol, the State Department of Motor Vehicles, the State Park Police, the Department of Fish and Game, just to name but a few . . . may find him/herself either investigating a crime or seeking a perpetrator on Indian land within his/her home county, or may even in the case of an official in a metropolitan jurisdiction, find him/herself pursuing an investigation and/or a perpetrator onto Indian land, albeit not within the home county.

Your Amici, the California State Sheriffs Association (CSSA) represents every elected sheriff of the 58 counties of the State of California serving a population of more than 34 million people throughout an area encompassing more than 163,000 square miles. CSSA is familiar with the questions of law and fact involved in this case and how the resolution of the questions presented herein may affect the entire law enforcement community.

This case raises an issue of critical importance to law enforcement agencies in the State of California and the public they serve: Whether the doctrine of tribal sovereign immunity enables Indian tribal officials to prohibit state law enforcement



officials, armed with a search warrant duly executed by a magistrate in full compliance with the Fourth Amendment, from searching tribal-owned/operated premises and/or facilities for evidence, or the perpetrator, of a state law violation.

Indeed, the decision of the Ninth Circuit in this case has such far reaching and potentially dire consequences, and is of such national importance, that the rule of law regarding search of "Indian land" pursuant to warrant must be settled by this Court.

It is for these reasons that this case is one appropriate for the Court's grant of certiorari, and is one which is furthermore most appropriate to amicus curiae briefing. Therefore, while joining in the briefs submitted by Petitioner County of Inyo, et al, as well as those of other potential amici such as the National State Sheriffs Association, the California State Sheriffs Association requests leave of this Court to appear as amicus curiae on behalf of Petitioner.

## THE NINTH CIRCUIT DECISION RENDERS ILLUSORY THE PROMISE OF PUBLIC SAFETY IMPLICIT IN PUBLIC LAW 280

Title 18 U.S.C. § 1162 provides that so-called Public Law 280 states have jurisdiction to enforce state penal statutes on Native American tribal lands. What this means in its simplest terms is that state law enforcement authorities in a Public Law 280 state have jurisdiction to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory. Id. It is important to

note that, unlike three of the six states enumerated in Public Law 280, California was given jurisdiction over "*all* Indian country within the State" (emphasis added) (Id.), whereas the statute excluded certain Indian lands from the criminal jurisdiction of other states.

That this law was enacted, and that this grant of state law enforcement authority was extended to tribal lands, is founded in the policy of ensuring that law enforcement protection on tribal lands was adequate to serve the needs of tribal members and the public interest. 106 Senate Report 327. But § 1162 is simply one manifestation of Congress' continuing concern with the welfare of Indian tribes under federal guardianship. Indeed, in adopting § 1162, Congress singled out certain reservations to remain subject to federal criminal jurisdiction. Congress' selective approach in § 1162 reinforces, rather than undermines, the conclusion that legislation directed toward Indian tribes is a necessary and appropriate consequence of federal guardianship under the Constitution. Furthermore, as stated by the Ninth Circuit Court of Appeals itself, Congress delegated to the States broad powers over criminal matters "because Congress' primary concern lay in the lawlessness on some reservations and the absence of tribal institutions for law enforcement. . . ." Confederated Tribes of Colville Reservation v. State of Wash., 938 F.2d 146, 147 (9th Cir. 1991).

To find that Public Law 280 would on the one hand confer on state officials criminal law enforcement authority on Indian land while at the same time countenance that this authority could be lawfully thwarted by the simple device of a tribal official asserting immunity as to records -- or tomorrow, perhaps a perpetrator – held behind lock and key is a legal absurdity and renders the promise of public safety implicit in the enactment of Public Law 280 illusory and of no



more substance, duration or meaning than a puff of smoke.

## THE NINTH CIRCUIT DECISION NULLIFIES THE POLICY OF RIGHTS AND RESPONSIBILITIES INHERENT TO OUR SYSTEM OF ORDERED LIBERTY

The issue before this Court strikes at principles rooted in the foundation of our Republic, the framing of the Constitution and the establishment of our system of ordered liberty.

The Framers -- John Adams, Thomas Jefferson and others -- did not fashion a governmental framework such as ours out of whole cloth. They drew their inspiration from the influence of the major social philosophers of their time; writers such as John Locke and Jean-Jacques Rousseau.

Under the social theories of John Locke, civil liberty and natural liberty depend on compliance with valid restraints. According to Locke, laws must comport with natural right, while procedurally they must issue from a duly constituted authority, such as a government or a legislature established by a social contract. Any interference with someone's actions requires a valid reason, and procedural liberty is the right of living under a duly constituted government. (Peter Laslett, Introduction to John Locke, Two Treatises of Government 46-49 (Peter Laslett ed., student ed. 1988) (3d ed. 1698). Simply stated, Locke's social contract stands for the principal that to enjoy the benefits of society, one has to be prepared to sacrifice that measure of natural liberty necessary to transition to ordered liberty.

Similarly, Rousseau observed that "The passage from the state of nature to the civil state produces a very

remarkable change in a man, by substituting justice for instinct in his conduct, and giving his actions the morality they had formerly lacked. Although, in this state, he deprives himself of some advantages which he got from nature, he gains in return others so great." (Rousseau, The Social Contract, 1762)

"Ordered liberty provides for freedom within assumed societal goals and values as opposed to freedom from assumed goals and values. Specifically, ordered liberty permits cultural pluralism within boundaries that the majority is willing to tolerate, so that the liberty we are afforded is not unfettered, but rather bounded by prevailing social dictates. "The Seattle Compromise: Multicultural Sensitivity and Americanization, Doriane Lambelet Coleman, 47 Duke L.J. 717 (1998).

Lockean theory continues to be recognized and embraced to the current time, as seen in City of Boerne v. Flores, (1997) 521 U.S. 507, a case dealing with religious exercise, wherein the theories of John Locke were referred to as "the right to do only what was not lawfully prohibited," (West, The Case Against a Right to Religion-Based Exemptions, 4 Notre Dame J. of Law, Ethics & Public Policy 591, 624 (1990)). The social theories of both Locke and Rousseau on submission to governance by the consent of the governed were commented upon by the Eleventh Circuit Court of Appeals in its 1993 decision in United States v. Forney, (11th Cir., 1993) 9 F.3d 1492, 1508 "The consent theory of government, expounded by philosophers such as John Locke and Jean Jacques Rousseau and adopted by our founding fathers, supports the concept of a government *entrusted* by the people with carrying on the affairs common to us all."



Against this backdrop, recall that Public Law 83-280 was enacted "because Congress' primary concern lay in the lawlessness on some reservations and the absence of tribal institutions for law enforcement . . . ." Confederated Tribes of Colville Reservation v. State of Wash., supra at 147. This law was, then, enacted expressly to help Native Americans living on reservations move from a state of lawlessness to one of the rule of law. This is consistent with the philosophy so influential to the Framers where to receive the benefits of ordered liberty one moves from the "natural state" to the civil or societal state, to the system of burdens, benefits, checks and balances we know as "ordered liberty." This is to the end that, to paraphrase the philosopher Cato, the government – "'a Few'" – might attend upon the affairs of all so that everyone might, with more security, live their lives in an environment of societal health, welfare and safety." (Thomas Gordon, Cato's Letter, No. 38, 22 July 1721, reprinted in 1 Phillip B. Kurland & Ralph Lerner, The Founders' Constitution, at 46 (1987))

Yet what the Circuit Court of Appeals has accomplished through its decision is to establish that investigation of any crime and/or arrest of any alleged perpetrator can at any time be thwarted by a "tribal" official placing evidence and/or the perpetrator of such criminal offense behind the barrier of a "tribal" veil; and, by so doing, to thwart our system of ordered liberty.

In this instance, the investigation was of welfare fraud alleged to have been committed by tribal members. In the next instance it could, on the Ninth Circuit's reasoning, as easily be a crime or arrest where the victim is a tribal member. For there would be nothing to prevent a tribal official from deciding that the investigation is unwarranted; that the perpetrator is innocent; or, that the perpetrator is a

tribal official -- or a friend or relative of a tribal official -- and so is deserving of being shielded behind a "tribal" door. This, then, becomes the rule of men rather than the rule of law.

If this be thought a hyperbolic stretch, then subject the Circuit Court's reasoning to the challenge of "if not, why not." If the tribal official in the instant case can do this, and not only be free from penal sanction, but be entitled to civil relief as the "victim" of police misconduct, why then cannot the same or another tribal official in any Public Law 280 state be free to declare tribal sovereignty as a bar to a criminal investigation which, for any reason or none, the tribal official decides will not go forward? In fact, there would be nothing to prevent a fleeing felon from claiming "sanctuary" from inside the casino doors.

To reject this argument on the basis that no tribal official would do so can only be met with the challenge that one asks of the Inyo County officials: did they ever imagine that a "tribal" official would have barred their way when executing a duly authorized search warrant for criminal evidence held in that "tribal" file cabinet.

And the net effect of this is not simply to deprive state governments of police authority over tribal lands and tribal members. The broader effect of this is to deprive tribal members, as well as every other citizen of such a state, of the benefits, as well as to relieve them of the burdens, of ordered liberty. It is to potentially take tribal lands and return them to the condition of lawlessness which Congress specifically sought to prevent in enacting Public Law 280. It is to nullify the social contract which lies at the heart of our system of liberty and governance.



## INYO COUNTY OFFICIALS ARE ENTITLED TO QUALIFIED IMMUNITY

In order to defeat a qualified immunity defense, the plaintiff must demonstrate that the right alleged to have been violated was established in a particularized way. Anderson v. Creighton, (1987) 483 U.S. 635(on remand 724 F.Supp. 654 (D. Minn. 1989); Lopez v. Robinson (4th Cir. MD 1990); Nicholson v. Georgia Department of Human Resources, (11th Cir. GA 1990) 918 F.2d 145. It is insufficient for a plaintiff to advance a violation of a broad abstract right even though it is clearly established in a generalized sense. Anderson v. Creighton, supra.

Before a defendant can be denied qualified immunity on a claim of violating a plaintiff's right, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Id. It is therefore essential to avoid abstraction in the determination of claims of qualified immunity in favor of "studying how these abstractions have been applied in concrete circumstances." Barts v. Joyner, (11 Cir., 1994)(cert. Denied, 493 U.S. 831(1989)). See also Cooper v. Dupnik, (9th Cir. 1991) 924 F.2d 1520, 1583 ["closely analogous cases, decided before the defendant acted . . . are often required to find a constitutional or statutory right is clearly established"]; and, Auriema v. Rice, (7th Cir. 1990) 910 F.2d 1449 ["The test for (qualified) immunity is whether the law is clear in relation to the specific facts confronting the public official when he acted."].

This Court's ruling in Malley v. Briggs, (1986) 475 U.S. 335, defines the meaning of the term "reasonable official" in this context: it means an official who stands outside the realm of "the plainly incompetent or those who

knowingly violate the law . . . " 475 U.S. at 341. In order to deny an official the ample protection of the rule of qualified immunity, it must be obvious to any but the plainly incompetent official that the given conduct is violative of "clearly established law." If officials of reasonable competence can disagree, immunity must be recognized. As the court stated in Romero v. Kitsap County, supra., 931 F.2d at 627-28, two of the primary inquiries in considering the defense of qualified immunity, i.e., the identification of the specific right allegedly violated and the determination of whether that right was so clearly established as to alert a reasonable officer to the constitutional parameters of that right, "present pure questions of law."

In this light, consider the conduct at issue in this case. The Inyo County officials, once confronted with the refusal of the tribal casino officials to disclose the employment records being sought, did not bull-dose their way forward with some flagrant display of force and in complete disregard for the Fourth Amendment rights of the tribal casino employer. They politely and discretely withdrew, and then did what every court in this nation has for decades been telling police officers to do; they went to a magistrate for approval of a search warrant based on probable cause. Once that state magistrate . . . for, after all, the sheriffs deputies were seeking to enforce a state penal statute . . . issued that warrant commanding the search at issue, the officials returned to the casino, where they were again met with the refusal of "tribal" officials to give them access to the records identified in the search warrant. The sheriffs officials then did what any police officer would do under the circumstances, and cut the lock to the records.

Confronted with these circumstances, what would a reasonable law enforcement official have known? They would



have known that:

- They were investigating an alleged violation of a state penal statute, namely welfare fraud.

- They would have known that they had a court issued search warrant, which their training and experience would have told them was required by the Fourth Amendment.

- They would have known that more than four decades earlier Congress had enacted Public Law 83-280 naming six states, California among them, as having law enforcement jurisdiction over state law violations occurring on tribal lands, or alleged to have been committed by tribal members.

- They would likely also have been aware of the holding by the Ninth Circuit Court of Appeals itself, stating that "[i]f the law is classified as criminal/prohibitory, California possesses jurisdiction under Pub.L. 83-280, § 2, 18 U.S.C. § 1162 (1988) and may enforce the fireworks law." Quechan Indian Tribe v. McMullen, (9th Cir., 1992) 984 F.2d 304.

- And, such officials likely would have been aware of this Court's earlier holding in California v. Cabazon Band of Mission Indians, (1987) 480 U.S. 202, in which, while disallowing state enforcement of regulatory statutes governing gaming, reaffirmed the principal that Public Law 280 states, such as California, do have enforcement power on tribal lands and as to tribal members insofar as concerns state criminal statutes.

In the face of such knowledge, circumstances, and prior decisional law, it cannot be fairly stated that a reasonable official in this situation would have known that his conduct violated a clearly established and particularized constitutional right of a tribe and/or tribal official to be at liberty to refuse compliance with a duly authorized order of the state court magistrate. Therefore, for these reasons, and based on established law, on in support of Petitioners County of Inyo, et at, and speaking on behalf of all 58 California sheriffs, any one of whom or their respective staffs with find themselves similarly situated, these amici urge this Court to set aside the decision of the Court of Appeals and direct that the individually named Petitioners be granted qualified immunity.

## CONCLUSION

For these reasons, as well as those expressed by Petitioner and such other amici as the Court may hear on behalf of Petitioner, together with such oral argument as the Court may be pleased to entertain, Amici California State Sheriffs Association respectfully urge the Court to set aside the ruling of the Ninth Circuit Court of Appeals and order judgment in favor of Petitioner, or, at the least, find that the individually named Petitioners are entitled to the defense of qualified immunity.

Respectfully submitted,

JONES & MAYER
PAUL R. COBLE
MARTIN J. MAYER
Attorneys for Amicus Curiae,
California State Sheriffs'
Association